Supreme Court, U.S.
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No. 00-1179

In The

Supreme Court of the United States

CHRISTOPHER G. HARRISON,

Petitioner,

v.

HON. JOSEPH R. KAINRAD, JUDGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent restates the Question Presented as follows:

1. Whether the denial of an authorization by the Court of Appeals to file a second or successive application for a writ of habeas corpus is appealable or can be the subject of a petition for a writ of certiorari pursuant to 28 U.S.C. §2244(b)(3)(E)?

2. Whether a second federal habeas corpus action by the same applicant is a second or successive petition where the district court decided the first application on the merits as well as on procedure?

PARTIES TO THE PROCEEDING

Petitioner

Christopher G. Harrison is an individual and has no corporate affiliations.

Respondent

The Honorable Joseph R. Kainrad, Judge, Portage County, Ohio Court of Common Pleas.

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OPINIONS BELOW

The Petition has several lower court opinions attached to it. These are:

(A) October 26, 2000 Order from the United States Court of Appeals for the Sixth Circuit denying Petitioner Christopher Harrison's motion for an order allowing him to file a second or successive habeas corpus application.

(B) February 29, 2000 Order from the United States District Court for the Northern District of Ohio granting Respondent Judge Joseph Kainrad's motion to transfer Harrison's application to the Sixth Circuit.

(C) February 8, 2000 Report and Recommendation of Magistrate Judge, recommending transfer of Harrison's application to the Sixth Circuit.

(D) May 19, 1997 Judgment of United States District Court for the Northern District of Ohio adopting April 11, 1997 Report and Recommendation of Magistrate Judge. (See (E) below)

(E) April 11, 1997 Report and Recommendation of Magistrate Judge dismissing Harrison's first federal application for a writ of habeas corpus.

In addition to the above opinions, Respondent attaches to this brief in opposition the March 11, 1998 Entry from the Supreme Court of Ohio denying Harrison leave to appeal his conviction. (Respondent's Appendix A)

JURISDICTION

This Court has no jurisdiction over this matter pursuant to 28 U.S.C. §2244(b)(3)(E).

STATUTORY PROVISIONS INVOLVED

The Petition sets forth the relevant federal statutes involved. In addition, 28 U.S.C. §2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

On February 6, 1996, the Portage County, Ohio Grand Jury returned a true bill on an indictment against Petitioner Christopher Harrison, charging him with involuntary manslaughter. Harrison states in his petition that this charge arose from a "head-on traffic collision resulting in the death of the other motorist." (Petition, p. 5) The "other motorist" had a name: Joseph Nirschl. He was twenty-six years old when he died. Involuntary Manslaughter was the only charge against Harrison. Harrison was *not* charged with the offense of driving under the influence of alcohol ("DUI"), although the elements of involuntary manslaughter as charged required the jury to find that Harrison caused the death of another as a proximate result of committing a misdemeanor of the first, second, third, fourth degree, or minor misdemeanor. DUI is generally a first-degree misdemeanor in Ohio.

The matter was tried to a jury. During its deliberations, the jury asked the trial court a question: whether it could find Harrison guilty of DUI but innocent of involuntary manslaughter. The trial court answered, "No." The jury found Harrison guilty of the offense of involuntary manslaughter.

The trial court sentenced Harrison to a term of incarceration of three to ten years and revoked his driver's license for life. Harrison appealed his conviction and sentence to the Ohio Court of Appeals for the Eleventh Appellate District, assigning as error on appeal the following:

> To [Harrison's] prejudice, the trial court erred by specifically instructing the jury that, on the charged offense of involuntary manslaughter * * * it could not find appellant "guilty" of the predicate misdemeanor * * * and "not guilty" of involuntary manslaughter.

Harrison did not frame this as a federal constitutional claim, but alleged solely an error in the application of Ohio law. The state court of appeals affirmed Harrison's conviction and sentence. Harrison attempted a discretionary appeal to the Supreme Court of Ohio, which declined jurisdiction in an entry dated March 11, 1998. (Respondent's Appendix A) It does not appear that Harrison filed a petition for a writ of certiorari to the United States Supreme Court, the deadline for which would have been ninety days later, on or about June 11, 1998.

In the meantime, the remainder of Harrison's prison term was suspended and he was placed on probation for a period of five years under the supervision of the Portage County Adult Probation Department.

On July 26, 1999, Harrison filed a Verified Petition for Writ of Habeas Corpus in the Supreme Court of Ohio. (Respondent's Appendix B) Harrison had previously filed a Verified Petition for Writ of Habeas Corpus in the Supreme Court of Ohio challenging the State court of appeals' denial of his motion for a stay of execution of

sentence and bail pending appeal. The Ohio Supreme Court dismissed this petition. Subsequently, Harrison filed his first Application for a Writ of Habeas Corpus in the United States District Court for the Northern District of Ohio. The District Court dismissed that Application on its merits.

In his second Verified Petition for a Writ of Habeas Corpus to the State Supreme Court, Harrison raised for the first time a federal constitutional claim regarding the trial court's answer to the jury's question. Harrison did not frame his challenge to the trial court's answer to the jury's question as a federal constitutional issue during the State direct appeal process. The Supreme Court of Ohio summarily dismissed this Verified Petition on September 1, 1999.

On October 20, 1999, Harrison filed a second Application for Writ of Habeas Corpus in the United States District Court for the Northern District of Ohio. That Application is the subject of this appeal. Respondent Judge Kainrad moved the District Court for an Order transferring the action to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. §2244 and *In re Sims*, 111 F.3d 45 (6th Cir. 1997). The District Court granted Judge Kainrad's motion. The Court of Appeals denied Harrison's request for an order authorizing the district court to consider Harrison's "second or successive petition for habeas corpus relief." It is from this order that Harrison now attempts to appeal.

ARGUMENT

I. The decision to allow or disallow a second habeas corpus application is not appealable.

The statue is very clear on this matter. 28 U.S.C. §2244(b)(3)(E) specifically states:

> The grant or denial of an authorization by a court of appeals to file a second or successive application *shall not be appealable and shall not be the subject * * * for a writ of certiorari.*

(Emphasis added.) Yet Harrison is now attempting to obtain a writ of certiorari from the court of appeals' denial of his request for authorization from that court to file his second application, the very thing that the above statute explicitly prohibits.

The above statutory provision was part of Title I of the Antiterrorism and Effective Death Penalty Act ("Act") which the President of the United States signed into law on April 24, 1996. This Court addressed the constitutionality of 28 U.S.C. §2244(b)(3)(E) in *Felker v. Turpin*, 518 U.S. 651, 661-62, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996). This Court determined that because 28 U.S.C §2244(b)(3)(E) has no effect on this Court's jurisdiction to entertain *original* habeas petitions, and because this Court's appellate jurisdiction can be limited by Congress, Title I of the Act is constitutional. Therefore, this Court's jurisdiction over the present petition for a writ of certiorari is explicitly barred. *Hohn v. United States*, 524 U.S. 236, 250, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

II. The application at issue is clearly a second habeas corpus application.

Harrison's first application for federal habeas corpus relief was adjudicated on its merits by the United States District Court for the Northern District of Ohio. (See Petition, Appendix E) Specifically, the District Court magistrate judge stated that, "Since there is no constitutional entitlement to post-conviction bail, [the state court's] denial [of post-conviction bail] did not rise to a level of deprivation of fundamental fairness." The Report and Recommendation of the magistrate judge was adopted by the District Court. (Petition, Appendix D) Determining the constitutionality of the issue raised by Harrison was certainly a decision on the merits by that court.

Both of Harrison's applications for federal habeas corpus relief arose from the same state conviction, to wit: his 1996 conviction for involuntary manslaughter.

Federal law considers Harrison's second application for federal habeas corpus relief a second or successive petition even though Harrison is raising different grounds than he did in his first application. "[A] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed[.]" 28 U.S.C. §2244(b)(2). A second or successive petition may be permitted if certain criteria are met, but only after application to and approval of "the appropriate court of appeals * * * authorizing the district court to consider the application." 28 U.S.C. §2244(b)(3).

28 U.S.C. §§2244(b)(3)(A) and (C) provide that the court of appeals may authorize the filing of a second application only if the court determines that the application makes a *prima facie* showing that it satisfies the criteria of that subsection. Accordingly, an application that raises different grounds for relief than stated in the initial application is a "second or successive" application requiring approval from the appropriate court of appeals – in this case, the Sixth Circuit.

The relevant standard for allowing consideration of a second or successive petition is set forth in 28 U.S.C. §2244(b)(2):

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable[.]

Harrison argues in his petition that the United States Court of Appeals for the Sixth Circuit decided a case that applies retroactively to his case, to-wit: *Herrington v. Edwards*, 6th Cir. Ct. App. Unreported Case No. 97-3542 (1/99). (Petition, Appendix F) However, *Herrington* is not a case by the *Supreme Court* that this Court had made retroactive to cases on collateral review.

Harrison argues that this case presents the same circumstances noted by this Court in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998), wherein this Court noted that the case did not

present a situation where a prisoner raised a *Ford* [*v. Wainright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)] claim for the first time in a second or successive habeas petition. A *Ford* claim is an assertion that the petitioner is insane, and therefore cannot be executed. In *Stewart*, the respondent Martinez-Villareal had earlier asserted a *Ford* claim that was dismissed as premature. Martinez-Villareal later moved the district court to re-open his *Ford* claim. This Court eventually held that 28 U.S.C. §2244(b) did not apply to Martinez-Villareal's *Ford* claim, because the federal district court had never ruled on its merits, having earlier dismissed it as premature. It was dismissed as premature because his execution was not imminent and his competency to be executed could not be determined until that time. *Id.* at 645, 118 S.Ct. 1618, 91 L.Ed.2d 335.

Harrison asserts that he was denied a fundamentally fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution due to the trial court's failure to permit the jury to return inconsistent verdicts. Harrison calls this a *Herrington* claim. However, Harrison's *Herrington* claim is unlike Martinez-Villareal's *Ford* claim in several important respects. First, a *Ford* claim cannot be adjudicated until execution is imminent, because such claim depends on the mental health of the inmate as his execution date draws near. A *Herrington* claim can be adjudicated at every level in the state courts. One can "federalize" a claim based on an alleged trial error at trial level, and throughout the state direct appeal process. In this case, Harrison failed to "federalize" his claim regarding the trial court's response to the jury's question until after he had exhausted his direct state

appeals. Under Ohio law, one must raise constitutional claims in a direct appeal if such claims are apparent on the record. The alleged error in this case (the alleged erroneous answer to the jury's question) was apparent on the face of the record from the moment the answer was given. The fact that a federal case was decided later that purportedly supports the federal nature of this claim does not negate the fact that Harrison could have, and should have, challenged the federal constitutionality of the answer at that time and on direct appeal. But Harrison failed to recognize the potential federal constitutional nature of his claim until such claim had been waived.

Second, in relying on *Stewart*, Harrison overlooks the obvious: *Ford* is a United States Supreme Court case, which can be the basis of a second or successive petition. *Herrington* is an unpublished Sixth Circuit case, which cannot.

Finally, the holding in *Herrington* is irrelevant to Harrison's situation. Herrington was charged with two separate counts: aggravated murder and aggravated robbery. The trial court instructed the jury in that case that it must return a guilty verdict on both counts, or a not guilty verdict on both counts. In the present case, Harrison was charged with only one count: involuntary manslaughter. There was only one possible verdict; either guilty or not guilty of involuntary manslaughter. There was not a second count. There could not be inconsistent verdicts. Thus, Harrison does not even have a so-called *Herrington* claim to present even if the district court were to consider his second application for federal habeas corpus relief.

The respondent Judge Kainrad's position can be summed as this: Harrison should have known when he filed his first federal habeas application that he had no federal constitutional right to bail pending appeal. Because he chose to file that first application, the merits of which were addressed, any subsequent application should be judged by the standards set forth by Congress for allowance of a second or subsequent petition. The policy of this legislation is so that all federal claims possible be set forth in the very first application for federal habeas corpus relief. This policy has been served in this case where Harrison has tried to "piecemeal" his federal claims and has not been allowed to do so.

III. Harrison's second application was filed outside the one year statute of limitations

Even if the Sixth Circuit ordered the District Court to consider Harrison's present application, such application is time-barred and would be dismissed. A one-year statute of limitations applies to applications seeking a writ of habeas corpus filed by a person held in custody by a state. Harrison's present claim is barred by the one year statute of limitations established by 28 U.S.C. §2244(d), which provides:

> (3) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (E) the date on which the judgment became final by the conclusion of direct review or

the expiration of the time seeking such review;

(F) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;

(G) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(H) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(4) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(Emphasis added.)

A. *Herrington* is not a Supreme Court case for purposes of 28 U.S.C. §2244(d)(1)(C)

As discussed in the previous section, the case upon which Harrison relies, *Herrington*, is not a Supreme Court case, so the date that it was decided (January 1999) is irrelevant for purposes of subsection (C) above.

B. The time for direct review expired on June 11, 1998 for purposes of 28 U.S.C. §2244(d)(1)(A).

Harrison attempted a direct appeal from the affirmance of his conviction and sentence to the Supreme Court of Ohio. On March 11, 1998, the Supreme Court of Ohio declined jurisdiction. (Respondent's Appendix A) Harrison had ninety days to file a petition for writ of certiorari in the United States Supreme Court and failed to do so. Therefore, Harrison's direct appeals were exhausted on or about June 11, 1998. Harrison then had one year from that date to file his federal habeas petition: on or about June 11, 1999. He failed to file the present federal Application for Writ of Habeas Corpus until October 20, 1999, more than four months late. Therefore, this claim would be appropriately dismissed by the District Court.

C. Harrison's state petition for writ of habeas corpus was not a "properly filed application" for purposes of tolling the statute of limitations pursuant to 28 U.S.C. §2244(d)(2).

Harrison filed a "Verified Petition for Writ of Habeas Corpus" in the Supreme Court of Ohio on July 26, 1999 (Respondent's Appendix B) that was not dismissed until September 1, 1999. However, this Verified Petition did not toll the time for filing a federal application under 28 U.S.C. §2244(d) because the statute of limitations expired before Harrison filed his latest state habeas action. The time for direct review of Harrison's present claim expired on or about June 11, 1998. At that time, there were no collateral actions pending in his case. Harrison's last state

habeas petition was filed on July 26, 1999, approximately six weeks after the statute of limitations expired pursuant to 28 U.S.C. §2244(d)(1)(A). Harrison's last state habeas action could not toll a statute of limitations that had already expired. See *Rashid v. Kuhlman*, 991 F.Supp. 254 (S.D.N.Y. 1998). Therefore, this claim would be appropriately dismissed by the District Court.

D. Harrison failed to raise his federal constitutional claims in his state direct appeal.

Though a person in state custody may challenge the constitutionality of his state court conviction by seeking habeas corpus relief pursuant to 28 U.S.C. §2254, he must first exhaust his available state court remedies by presenting his claims to the state courts to provide those courts an opportunity to remedy any constitutional infirmities in his conviction. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). It is the applicant's burden to prove exhaustion. *Darr v. Burford*, 339 U.S. 200, 218-19, 70 S.Ct. 587, 597-98, 94 L.Ed. 761 (1950). "The exhaustion requirement is satisfied when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Rust*, supra, quoting *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990).

However, "[e]xhaustion is a problem only if the State still provides a remedy for the habeas petitioner to pursue, thus providing the state courts an opportunity to correct a constitutionally infirm state court conviction. If no remedy exists, and the substance of a claim has not been presented to the state courts, no exhaustion problem

exists; rather, it is a problem of determining whether cause and prejudice exist to excuse the failure to present the claim in the state courts." *Rust*, supra. "Cause and Prejudice" requires an applicant to demonstrate cause for the procedural default *and* actual prejudice resulting from the alleged constitutional error. *Rust*, supra.

In this case, Harrison failed to present his claim as a federal constitutional claim to the Ohio courts. At first glance, therefore, he has not exhausted his state remedies as to his federal constitutional claim. However, there is no state remedy available to Harrison at this time for him to pursue. Ohio postconviction relief is no longer available to Harrison because Ohio's doctrine of *res judicata* bars any claim that was or could have been presented on the direct appeal from his conviction and sentence. The doctrine of *res judicata* bars a convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense that was raised or could have been raised by the defendant at trial. *State v. Szefcyk*, 77 Ohio St.3d 93 (1996), at the syllabus.

In this case, Harrison had all of the information that he needed to present his constitutional claim regarding the jury question and the trial court's answer to that question to the Ohio courts. Harrison failed to do so and has not shown, and cannot show, cause for his failure to do so. To establish cause, a habeas applicant must present a substantial reason to excuse his procedural default. *Rust*, supra, at 161. "[T]he existence of cause for a procedural default must ordinarily turn on whether the [applicant] can show that some objective factor *external* to the defense impeded counsel's efforts to comply with the State's procedural rule." (Emphasis added.) *Rust*, supra,

quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). Surely, Harrison's present issue regarding the state trial court's answer to a jury question could have long ago been framed as a federal constitutional issue, notwithstanding that *Herrington*, an unpublished federal appellate case, had not been decided.

CONCLUSION

For the foregoing reasons, this Court should decline certiorari.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO

State of Ohio,	:	1998 TERM
Appellee,	:	Case No. 98-80
v.	:	E N T R Y
Christopher G. Harrison,	:	(Filed Mar. 11, 1998)
Appellant.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal.

COSTS:

Docket Fee, $40.00, paid by Guarnieri and Secrest.

(Portage County Court of Appeals; No. 96P0240)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX B

IN THE SUPREME COURT OF OHIO

STATE, ex rel. CHRISTOPHER G. HARRISON 401 Greenbriar Drive Cortland, OH 44410 Petitioner v. HON. JOSEPH R. KAINRAD, JUDGE Portage County Court of Common Pleas 203 West Main Street P.O. Box 1035 Ravenna, OH 44266-1035 Respondent	Case No. 99-1380 **VERIFIED PETITION FOR WRIT OF HABEAS CORPUS** (Filed Jul. 26, 1999)

ORIGINAL ACTION IN HABEAS CORPUS

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